doing of any work, not otherwise provided, necessarily or properly done before a settlement of the matter in dispute. And this work, according to the Note, includes taking instructions to sue, considering the facts and law and attending on and corresponding with client, all of which the plaintiffs' solicitors claimed to have done in this case. The fee for such work under item 26 is entirely in the discretion of the taxing officer and will of course depend on the nature of the case and the amount of work necessarily and properly done. In my judgment the Registrar should have allowed in this case a fee under item 26 in lieu of the $700 claimed as a "getting up" fee. The proper course now would be to remit the matter back to the Registrar for him to consider and award a reasonable fee under item 26, but as this matter has already been considerably delayed, I propose to deal with it myself. I award the plaintiffs a fee of $200 under Item 26 in lieu of the $700 claimed which was disallowed by the Registrar. The appeal is allowed with costs.

Appeal allowed.

Solicitors: *Drew & Napier; Ong Swee Keng & Co.*

MALAYSIAN REPORTS

LIM SENG HEE & ANOR. v. LEE TUAN WEN & ANOR.

[O.C.J. (Chang Min Tat J.) September 9, 1972]

[Ipoh — Civil Suit No. 398 of 1970]

Mining — Contract — Sub-lease — Stoppage of mining operation — Application for cancellation of lease — Damages — Mining Enactment (F.M.S. Cap. 147), s. 16(iii)(b) & (c).

The plaintiffs in this action were the owners of a piece of land held under a Mining Certificate No. 30/66. On February 27, 1967, they granted a sub-lease of the land to the defendants "for the period of the mining certificate or mining lease issued in place thereof and any renewals or extensions."

Clause 8(iii) of the sub-lease read as follows:—

"that this sub-lease shall be liable to cancellation at any time at the discretion of a Senior Inspector of Mines or the Court upon proof that the sub-lessees have not during the period of 6 months employed at least 57 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of the Mining Enactment for not less than 1 month in mining the said land."

The plaintiffs alleged that since April 1, 1970, the defendants have completely stopped mining the land. Despite a written notice and various other requests, they did not resume mining. Finally on October 5, 1970, the plaintiffs through their solicitors advised the defendants of their intention to apply for the cancellation of the lease.

The plaintiffs claimed to have suffered damage in the form of loss of tribute or profits from April 1, 1970, and prayed for cancellation of the sub-lease, an injunction, damages for loss of tribute or profits and costs.

The defence denied the allegations that the defendants had been in breach of the provision for continuous mining and alleged that the defendants had in fact carried out considerable preparatory mining work, prior to the submission of a mining scheme to the Mines Department. The defendants accordingly prayed for the dismissal of the action with costs.

Held: (1) on the facts no mining operations were carried on after April 1, 1970 until the commencement of the action and therefore there was a breach by the defendants of clause 8(iii) of the sub-lease;

(2) in the circumstances of the case, this was not a suitable matter for cancellation;

(3) the damages could not be the actual loss of tribute or the reasonable interest that could accrue on this sum if paid but the loss of use. In this case $2,000 for damages for breach of contract should be awarded.

CIVIL SUIT.

Peh Swee Chin for the plaintiffs.

N. T. Rajah for the defendants.

Chang Min Tat J.: The plaintiffs in this action commenced by writ on 28 October 1970 are the owners of a piece of land held under a Mining Certificate No. 30/66. On 27 February 1967 they granted a sub-lease of the land to the defendants "for the period of the mining certificate or mining lease issued in place thereof and any renewals or extensions."

Clause 8(iii) of the sub-lease reads as follows: —

"that this sub-lessee shall be liable to cancellation at any time at the discretion of a Senior Inspector of Mines or the Court upon proof that the sub-lessees have not during the period of 6 months employed at least 57 labourers or labour-saving apparatus equivalent thereto as prescribed in section 16(iii)(b) of the Mining Enactment for not less than 1 month in mining the said land."

The plaintiffs averred that since 1 April 1970, the defendants have completely stopped mining the land. Despite a written notice and various other requests, they did not resume mining. Finally on 5 October 1970 the plaintiffs through their solicitors advised the defendants of their intention to apply for the cancellation of the lease.

The plaintiffs claimed to have suffered damage in the form of loss of tribute or profits from 1 April 1970 and prayed for cancellation of the sub-lease, an injunction, damages for loss of tribute or profits and costs.

The defence, delivered on 3 December 1970 was short and succinct. It denied all the allegations that the defendants had been in breach of the provision for continuous mining and alleged that they —

"with the object of commencing operations for the extraction of tin ore, did carry out considerable mining works, such as prospecting, boring, removal of overburden, clearing land for palong, etc., prior to the submission of the mining scheme to the Mines Department. The defendants further state that they had spent considerable amounts of money on such prospecting, boring, removal of overburden, construction of palong at the site and that they are now in a position to commence immediate mining operations as soon as the scheme is approved by the Mines Department."

They accordingly prayed for the dismissal of the action with costs.

Now, the sub-lease provides in clause 4 that, the sub-lessees shall work the said land in an orderly skilful and workmanlike manner and subject to the provisions of the Mining Enactment. Section 16 of the Enactment spells out the implied conditions on the part of the lessee to be performed.

Section 16(iii) (b) provides —

"that... the lessee shall employ at work thereon not less than such number of labourers as shall be mentioned in such mining lease or labour-saving apparatus equivalent thereto...."

and (iii) (c) —

"that thereafter the lessee shall not at any time during the term of the mining lease fail for a period of more than twelve consecutive months to substantially and efficiently carry on mining operations on the land and to keep at work thereon such number of labourers as shall be mentioned in the mining lease or labour-saving apparatus equivalent thereto calculated as aforesaid."

These conditions are by section 18 binding on the sub-lessee.

Section 19 and section 21 provide that a breach of any of the conditions in section 16(iii) shall render the lease liable to forfeiture.

Clause 8 of the sub-lease provides that it shall be liable to cancellation at any time at the discretion of the Senior Inspector of Mines or the court upon proof, *inter alia*, (ii) that the sub-lessees have not worked the land in accordance with clause 4 of the sub-lease or have by their default rendered the land liable to forfeiture under the Mining Enactment.

It is, I think, generally accepted that a breach of any of the conditions in section 16(iii)(b) or (c), *supra*, will render the sub-lease liable to forfeiture and at the instance of the sub-lessor, subject to cancellation at the discretion of the trial court.

In the Agreed Bundle of Documents, the plaintiffs produced a letter to the Mining Department to which they annexed the boring results of the land which had been carried out in 1964 under a prospecting permit and in which they expressed themselves satisfied with the results and they accordingly applied for conversion of the land, then agricultural, to mining. As many as 33 bores were indicated and from the plan attached the boring was seen to be fairly systematic and covered the entire area of the land.

The plaintiffs obtained the mining certificate on 1 September 1966 and on 27 February 1967 granted the sub-lease in question to the defendants.

From two statements of accounts from the Straits Trading Co. Ltd. it was clear that the defendants commenced mining of the land before December 1967. Tin ore was won by them from the land and sold and the tributes at the agreed percentage were paid to the plaintiffs from December 1967 to March 1970. The payment for March 1970 was the last received by the plaintiffs. It was their contention that thereafter the defendants ceased mining operations and for this reason they did not receive further tributes.

The evidence adduced was somewhat lengthy and detailed and as was only to be expected, in direct conflict. The 1st plaintiff said he had gone on the land after 1 April 1970 and found no mining operation. He had a witness who accompanied him on several occasions but who was described by the defence as a providentially convenient witness. The 1st defendant gave affirmed evidence admitting that the defendants had indeed stopped mining for ore after March 1970 because they found it uneconomical to continue doing so on the part of the land they were then mining and contended that in order to shift to the middle portion they had to do preliminary works such as building a bund and constructing a ditch, stripping the over-burden, carrying out boring operations, and finally putting up a mining plan for approval. He also produced witnesses in support of his evidence, in the persons of the contractors who did the bund-building and stripping.

If this was a case in which the oral evidence of the witnesses was the only means of determining this case, it would require greater perception than I could lay claim to. But there is evidence from certain correspondence and from the conduct of the parties over this period that in my view points to where the truth lay.

By a notice dated 15 April 1970, i.e. a scant fortnight after the defendants had, as admitted, stopped mining (and I bear in mind that by mining they meant mining for ore and not the preliminary work necessary for this purpose), the plaintiffs gave notice that if the defendants failed to resume mining operations within a reasonable time, they the plaintiffs would take such steps as they would be advised. No reply was vouchsafed to this. Then on 5 October 1970, after averring that in spite of their several reminders, mining operations have not been resumed, the plaintiffs gave notice terminating the sub-lease and indicating their intention to apply for cancellation of the sub-lease for breach of the aforesaid clause 8(iii).

It is not necessary for me to dilate on the legal effect of this termination but quite clearly on the law as enacted in the Mining Enactment and on the wording of the sub-lease, cancellation of the sub-lease can only be effected by a decision either of the Senior Inspector of Mines or of the court. Whether after termination by notice and before the order for cancellation by the competent court the sub-lessees could continue to work the mine was not an issue that was taken.

Be that as it may, it was only after the receipt of the notice of termination that the defendants moved into action, so far as correspondence between the parties went. By a letter dated 13 October 1970, the defendants averred that for some time past they had been "carrying work on the (above) land, making all the necessary arrangements to commence mining operations and that they had also submitted their scheme of mining to the Inspector of Mines Tapah for approval." A copy of a plan showing the defendants' scheme of mining was annexed. The plan which was for Thoong Fatt Kongsi No. 2 displayed the date 9 October 1970 and was signed by the defendants as "Tuan punya lombong" i.e. owners of the mine. This scheme was approved on 6 November 1970 on certain conditions but even then it was not until 30 March 1971 that the defendants gave written notice to the Inspector of Mines Tapah of resuming mining for production on 1 April 1971.

The case, be it noted, was set down for hearing on 6 April 1971. The plaintiffs were therefore forced to admit that mining was recommenced just before the hearing.

It was the case for the defendants that though they actually commenced mining for production of tin ore only on 1 April 1971, they had in the meanwhile carried out certain preliminary works necessary before productive mining could be resumed. They were necessary because they had from 1967 to March 1970 mined the southern portion of the mining land, in the course of which they had dumped their tailings on the middle portion. By reason of the extent of this dumping, they had after March 1970 to construct a retaining bund and to dig a ditch some 3 chains long, 10 feet deep and 6 feet wide. They then had to strip the tailings on the middle portion of the land, and bore the land before they could mine the land.

The defendants called two contractors as their witnesses. Liew Yook Chan (DW3) who claimed to be a contractor operating under the name of Liew Brothers testified to his working at the request of the defendants in the matter of the bund construction and ditch-digging. He identified three invoices which he sent for work done. They were for tractor construction work for $747.50 (Exh. D3B) and ditch-digging for $60 (Exh. D3C) and a bill (Exh. D3A) both for August 1970 which embodied these two items and a vague claim for construction work for $1,000, in the total sum of $1,807.50. The bund he constructed (for a shorter length than that claimed by the 1st defendant) at the place indicated by him along the boundaries with lots 4719 to 4721 was clearly, if reference be made to the plan annexed to the mining scheme, for the purpose of containing primarily the water in the waterhole dug in mining the southern portion and secondarily the tailings.

In cross-examination, this witness admitted that during his work on the land and during his occasional visits to the work site he did not see any other work done by another contractor.

The other contractor Liew Foo (DW4) was more observant, perhaps because he was more accommodating. He said he saw some others digging and also boring the land. He also commenced work in the same month of August 1970 and went on until January 1971. His work was to remove the tailings. His bills from August to November 1970 were made out to Thoong Fatt Tin Mine and after November, to Thoong Fatt Mine No. 1.

Now at this juncture I must refer to the confusion in the name of the mine. It led to a certain difficulty at the hearing and in reaching a decision but on analysis, it became revealing.

The sub-lease was made out to the defendants in their personal names but clearly from the sales of tin ore to the Straits Trading Co. Ltd. (see pp. 7 and 8 of A) the defendants operated the mine under the partnership name of Thoong Fatt Kongsi. But whether it was Thoong Fatt Kongsi No. 1 or Thoong Fatt Kongsi of No. 1 Tapah Road as at December 1967, it was not clear. Neither was it ever clarified. But a closer examination would appear to indicate that it was more likely Thoong Fatt Kongsi. The personal address was not No. 1 Tapah Road but No. 46 Main Road, Bidor. But at some stage or other, a Thoong Fatt Tin Mine No. 2 appeared. In the evidence of the other partner D.W. 2, the defendants were issued with a mining certificate M.C. 29/70 in May 1970 which covered land adjoining the plaintiffs' land in M.C. 30/66, and they commenced mining operations on their own land in July 1970. There were then 2 mines. It would perhaps be logical to call the new mine on defendant's own land Mine No. 2, if it was desired to keep such a propitious name as Thoong Fatt, but in the words of the 1st defendant, under cross-examination —

> "The mine on plaintiffs' land was known as Thoong Fatt No. 1 and the mine on my land was also known as Thoong Fatt No. 1. We have a mine known as Thoong Fatt No. 2 but that is the new mine on plaintiffs' land. Yes, we have changed the plaintiffs' mine from No. 1 to No. 2 on 13.10.1970. when we were about to re-commence mining."

This witness persisted in re-examination. There he stated categorically —

> "Exh.D.4 A-K (i.e. the bills from Liew Foo, D.W.4, the contractor) the word No. 1 appeared here and not in other bills because Tin Mine No. 2 commenced only in April 1971 and all bills previously were in respect of Mine No. 1."

If this evidence was accepted and it came from the defendant's own mouth, it must mean that all references to Thoong Fatt Tin Mine or Thoong Fatt Tin Mine No. 1 prior to April 1970 (a period over which there is no quarrel) were to the mine on the plaintiffs' land and that from 1 April 1970 when in the admission of the defendants, they were not operating the mine on the plaintiffs' land but only conducting, as they claimed, preliminary works, and especially from May 1970 when the mine on their land was in full operations, any reference to Thoong Fatt Tin Mine or Thoong Fatt Tin

Mine No. 1 must in their intention refer to the mine on their own land. This would appear to be borne out by the plan annexed to the application for approval of the mining scheme of the middle portion of the plaintiffs' land (see p. 14 of A) where the reference was to No. 2. This must mean that the work done by the contractors D.W.3 and D.W.4 was done, from the reference to Thoong Fatt Tin Mine only up to November 1970, either on the defendants' own land (which would explain perhaps why D.W.3 did not see the operations of D.W.4) or if work was on the plaintiffs' land, for the purpose of the defendants' mine on their own land, having regard to their need at this time for work and for a dumping ground of tailings.

I am prepared at law to accept that preliminary work such as ditch-digging, bund construction and removal of the over-burden which are necessary preliminaries to actual mining would save the lease but I do not think that any work done on the plaintiffs' land for the purpose of the defendants' mine on their adjoining land is "working the land in an orderly, skilful and workmanlike manner and subject to the provisions of the Mining Enactment," and applied the labour force employed to prevent the breach of clause 8(iii). The deposition of tailings, in one particular area, would make subsequent mining of the area more difficult. To dump only to have to remove cannot by any stretch of the imagination be called efficient, unless for want of a dumping ground. The labour force employed was not in connection with the mine in question.

In this connection, the distinction made by the contractor Liew Foo D.W.4 to his bills after November 1970 by designating it No. 1 which must refer to the defendants' own mine must be false if testified as referring to work done on the plaintiffs' land. It must be a contradiction of the defendants' own testimony which so far as it said was work on the mine on the plaintiffs' land, must be false. The work done by Liew Foo D.W.4 after November 1970 was clearly work done on or for No. 1 mine, the mine on defendants' own land.

And in connection with the credibility of the defence, it is in my view significant that they should claim without seriously making any substantial effort to prove it that they bored the land in the intervening period of inactivity. The land had been extensively bored by them in 1964 prior to their taking up a sub-lease. With this knowledge at hand, there was no necessity to re-bore. Their explanation that they wanted to know the depth of the over-burden is, with respect, so unreasonable that it ought to be dismissed out of hand. Probing to discover the depth of the over-burden is distinct from and a much easier operation than boring for the mineral contents of the ground.

Then again, I am not at all sure that this claim of boring was ever proved by the defendants. In his examination-in-chief D.W.1 claimed that "we" carried out boring between 8 August 1970 and 30 August 1970. The results were compiled in a report which was accordingly put in as Exh.D.5. The accompanying sketch was marked Exh. D.6. The report was signed by one Lim Kon Nam, Manager. It was expected that this Lim Kon Nam, who must from the difference in name and from the difference in designation be a different person from Lim Kuan Nam, D.W.2, the other partner, would be called to identify Exh.D.5. and to render it probatively admissible. Lim Kuan Nam did not say one word that he was also known as Lim Kon Nam or that he was ever connected with the boring. Lim Kon Nam was never called, neither was Ong Kee Lek who in the evidence of D.W.1 assisted at the boring and supplied the labour. No bills were also produced or proved. But Exh.D.5 was put in under colouration of the evidence of D.W.1 that he compiled the results. But he did not sign them and as I understand the Evidence Ordinance, Exh.D.5 is therefore not admissible. But as I have indicated, even if it was admissible, the evidence of boring in August 1970 could not be true. There was no necessity for such a heavy expenditure. Moreover the lapse of about 2½ months from the alleged conclusion of the boring to the application for approval of the mining scheme was too long a period to lend credibility to the allegation.

There was some evidence of negotiation for a loan between the parties but my view of this evidence is that it does not carry the case much further either way.

On a review of the evidence and for the reasons above stated, I am of the view that the evidence of the plaintiffs that no mining operations were carried out after 1 April 1970 until the commencement of the action is the truth and that the testimony of the defence and their witnesses is not sufficiently grounded in truth, reason or logic to rebut the plaintiffs' evidence, or to establish on a balance of probability that they carried out the work as claimed. I therefore hold and find as a fact the breach by the defendants of clause 8(iii) of the sub-lease.

The next question is whether the court should in its discretion cancel the sub-lease. On this question, while it is clear from this judgment that I am not attracted by the evidence adduced by the defendants, I do not think on a consideration of all the circumstances of this case that this is a suitable matter for cancellation. The plaintiffs are obviously not in a financial position to mine the land. The defendants are. While they were not tempted to work the plaintiffs' land when they had their own mine going, they had started to mine the plaintiffs' land. Their reasons may be oblique. They were faced with this action and had to do something about it. And they were fortunate enough to beat the gun, to re-start mining before the actual hearing. They have therefore shown themselves to be financially able to do so. The plaintiffs are in the mining world for the tribute from their holdings. If the sub-lease is cancelled they would have to sub-let to another and since this would mean a certain stoppage, it does not perhaps appear to be in their best interests. But if on a consideration of the circumstances pertaining to this case they fail to obtain an order for cancellation, they are clearly entitled to damages for breach. This is a much more difficult question, especially as not much evidence was led on their loss. They had suffered some damage but what this is is difficult to say. It could of course be said that the damage suffered by them was a delay in paying the tribute for the tin to be

won, which could not be more or less than what it factually is or proves to be. But while this is probably true, could not the loss be either the loss of use of the amount of tribute for the period 1 April 1970 to 31 March 1971 or merely the reasonable interest due on this sum? In my view the damages could not be the actual loss of tribute or the reasonable interest that could accrue on this sum if paid but the loss of use. Lack of information of the probable amount of tribute for one year and of the use to which the plaintiffs would put the money to does not make for easy assessment. But I have no doubt that people of the plaintiffs' origin would make good use of any capital and doing the best I can, as I am enjoined to do in the circumstances, I would award $2,000 for damages for breach of contract. The plaintiffs will have the costs of the action.

I would conclude with first an apology for the delay in writing out this judgment and secondly a hope that hereafter there will be contractual peace between the parties.

Order accordingly

Solicitors: *Peh Swee Chin; Maxwell, Kenion, Cowdy & Jones.*

NAVARATNAM v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) and Ali F.J.)

October 2, 1972]

[Kuching — Federal Court Criminal Appeal No. 19 of 1971]

Penal Code, s. 409 — Criminal breach of trust — Proof of dishonest intention.

This was an appeal against the conviction of the appellant for criminal breach of trust. The question for consideration in the case was whether the appellant took the money with dishonest intention. He stated that he took the money to pay a lawyer who had been asked to act as defence counsel for the prisoner to whom the money belonged.

Held: in this case there was nothing in the prosecution evidence to dispute the truth of the appellant's statement that his intention in taking the money and keeping it in his flat was to pay the lawyer and therefore the conviction in this case was unreasonable and cannot be supported.

Cases referred to:-

(1) *Harakrishna Mahatab* v. *Emperor* A.I.R. 1930 Patna 209.

(2) *Mohamed Adil* v. *Public Prosecutor* [1967] 1 M.L.J. 151.

FEDERAL COURT.

Edgar Joseph Jr. (*S. Sahathevan* with him).

Denis Ong Jiew Fook (Deputy Public Prosecutor) for the respondent.

Ali F.J. ((read by Ismail Khan C.J.) delivering of the court): The appellant was tried on four charges of criminal breach of trust under section 409 of the Sarawak Penal Code, Cap. 7 and was convicted and sentenced on three of them. On the third charge he was acquitted on the ground that the prosecution failed to make out a *prima facie* case.

All the four charges in this case were in respect of cash belonging to Mohamed Zain bin Laji who, pending his trial on a charge of murder, was on remand in Sibu Prison. The appellant was the officer-in-charge of the prisons and in that capacity was said to have been entrusted with the prisoner's belongings for safe keeping.

The facts which are not in dispute are shortly as follows: On January 2, 1971 the police from the Anti-Corruption Agency, Sibu, Sarawak raided the Sibu Prison and discovered that a substantial amount of cash belonging to the remand prisoner missing from the office safe. Cash belonging to six other detainees were also found missing but no detailed evidence was given in respect of it and it was not suggested that the appellant had anything to do with it. Evidence against the appellant, however, was in respect of money which belonged to Mohamed Zain who, according to the evidence, had received various sums of money between July and December, 1970. These amounts were placed in six different envelopes, marked as Exhibits P1, P2, P3, P4, P5 and P6. They were all locked in the office safe for safe custody. Over $1,900 was found missing from the envelopes. The appellant being away on leave on the day of the raid did not have or was not given any opportunity to explain what happened to the missing cash. But on the day after the raid when he came to the office he told Assistant Superintendent of Police Poh Thuan Keat, the investigating officer, that the money was in his flat. Later the same day he handed over $1,700 to the police. On January 5, 1971 he handed another $300. On these facts the question for consideration would appear to be, whether the appellant took the money with dishonest intention. In terms of section 405 of the Penal Code, did he dishonestly misappropriate or convert to his own use the money which he took?

On the question of dishonest intention, we can do no better than quote a passage from the judgment of Fazl Ali J. in *Harakrishna Mahatab* v. *Emperor*.(1) We do so because the learned trial judge in the instant case has referred to it as having been cited with approval by Ismail Khan J. (as he then was) in the case of *Mohamed Adil* v. *Public Prosecutor*.(2) Fazl Ali J. said:

"It is not necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, because under the law even temporary retention is an offence provided that it is dishonest; but the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not *mens rea* for the crime...."

In a long judgment covering several pages the learned trial judge dealt with all aspects of the evidence and arguments before him and gave his reasons for the finding that the appellant was guilty on the first, second and fourth charges. In convicting the appellant on the first and second charges, he said:

"I had carefully examined the evidence produced by the prosecution and had come to the conclusion that in so far as the evidence of Dunstan relating to the 1st and 2nd charges were concerned, there was no corroboration of his testimony. I